Supreme Court, U.S.
FILED
SEP 19 1997
CLERK

No. 97-79

In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM

Petitioner

v.

MR. DOE AND MRS. DOE

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION AND RESPONDENTS' MOTION TO PROCEED IN *FORMA PAUPERIS*

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SEPTEMBER 1997

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STATEMENT OF JURISDICTION

I. THIS CASE IS NOT MOOT

As a threshold matter, the Petitioner addresses the Respondents' suggestion of mootness raised at pages 13-15 of their brief in opposition, since mootness implicates the jurisdiction of this court. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978).

The general rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action was initiated. *United States v Munsingwear, Inc.*, 340 U.S. 36 (1950). In seeking to have a case dismissed as moot, the party suggesting mootness bears a heavy burden. *Gwaltney v Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987). The party claiming mootness must demonstrate that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur". *Id.*

The Respondents appear to argue that because "the children are at home and safe", this case is now moot. The Respondents further rely on proceedings in the family court, specifically a review hearing held on August 7, 1997, which occurred after the filing of the Petitioner's petition for writ of certiorari. See, Resp. App. 1-4. Those family court proceedings occurred on remand from the South Carolina Supreme Court. Pet. App. 3A. The South Carolina Supreme Court's opinion affirmed the Court of Appeals narrowly tailored order of remand "to the family court for further proceedings on the issues of neglect and mental injury", and required a de novo hearing based on the current conditions of the home. Pet. App. 8A. The South Carolina appellate courts did not remand for a de novo hearing on the issues of physical and sexual abuse alleged in the Horry County Department of Social Services ("DSS") initial complaint. Pet. App. 9A-10A.

The proceedings in the family court on remand, if anything, illustrate the obvious system failure which has occurred due to:

(i) the failure of the South Carolina appellate courts to engage in meaningful appellate review; (ii) the DSS's failure to fully investigate the mental status of the children and the reason their mother left the family home[1]; and (iii) the DSS failure to have the children evaluated by a medical or mental health professional in anticipation of the family court proceedings on remand for factual findings on neglect and mental injury. The family court's judicial review order dated September 2, 1997 (Resp. App. 1), relies upon a Complaint of Relief from Custody dated July 29, 1997, with the affidavit of a DSS caseworker attached. (Resp. App. 5-10). Based upon a single, apparently announced visit to the Respondents' home, the caseworker found the home "clean and without any health or safety hazards". (Resp. App. 9). The DSS Relief from Custody Complaint indicates that the children's mother inexplicably left the family home and moved out of state. See, Resp. App. pp. 9 and 5. The affidavit further indicates that the children now reside only with their father, whom the DSS alleged to be the primary perpetrator of physical and sexual abuse. See, Pet. App. pp. 20A, 21A and 10A. Despite the explicit order of the South Carolina Court of Appeals directing a de novo hearing on issues of mental injury and neglect, the DSS failed to have the children evaluated by a mental health professional or medical professional. Resp. App. 2. The DSS also failed to interview the children's mother. Counsel for the children - the Petitioner - was not notified until receipt in the mail of a summons dated July 29, 1997 that the DSS would be filing a Relief of Custody Complaint and that a review hearing was scheduled for August 7, 1997. The Petitioner sought a continuance, which was initially granted until September 18, 1997, and then later reassigned to the earlier date of August 7, 1997. The Petitioner has filed a motion with the family court for reconsideration of the Judicial Review Order of September 2, 1997. A copy of the Petitioner's motion for reconsideration is being filed with the U.S. Supreme Court contemporaneously with the Petitioner's Reply. The details of the proceedings in the family court are more fully set forth in the Motion of Reconsideration.

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[1] Upon information and belief, the Petitioner has been made aware that there has been a domestic violence call to the Respondents' home within the past 12 months.

Regardless of the outcome of the proceedings in the family court on remand, the federal constitutional issues raised in the petition for writ of certiorari are not moot, as a live and actual controversy exists between the parties . The petition deals with past abuse, not the existence of ongoing abuse or present conditions in the home. This Court should apply the "capable of repetition, yet evading review doctrine" in order to insure that protective custody cases do not remain unreviewable in the South Carolina appellate courts and elsewhere. See, *Shall v Martin*, 467 U.S. 253 (1984). If protective custody cases are unreviewable on appeal due to "staleness", and deemed moot upon remand, erroneous family court decisions will remain unreviewable. This would totally usurp the ability of counsel for the children to create the appropriate legal record in protective custody cases. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment (cite omitted). The same is true when mootness results from unilateral action of the party who prevailed below". *U.S. Bancorp. Mortg. Co. v Bonner Mall*, 513 U.S. 18 (1994).

This court had no difficulty in rejecting suggestions of mootness in *Roe v Wade*, 410 U.S. 113 (1973), *Doe v Bolton*, 410 U.S. 1979 (1973) and other cases cited in *Super Tire Engineering Co. v McCorkle*, 416 U.S. 115, 126 (1974). "The important ingredient in these cases was the governmental action directly affecting and continuing to affect, the behavior of citizens in our society". *Id.* The practice of remanding protective custody cases due to staleness is a governmental action which directly affects and continues to affect the behavior of citizens in our society. It condones system failure on the part of the legal system and on the part of child protection agencies, placing children at risk and potentially returning them to abusive homes without meaningful appellate review of their cases.

Moreover, there is no evidence in the record that the three children will not be subjected to future abuse, neglect or mental injury. This case is the third time the Respondents have come to the attention of child protective agencies. The issues at stake are capable of repetition yet evading review, and could reoccur for these

children, as well as other similarly situated children in South Carolina.

REPLY TO STATEMENT OF THE CASE

While dwelling on the contradictions in the children's testimony, the Respondents avoid, for obvious reasons, the more compelling evidence of the vaginal and anal scarring found on the oldest of the two girls, Savannah, and the anal scarring found on Theresa. The children's testimony of physical and sexual abuse, while at times contradictory, which is not at all surprising given the circumstances of testifying in the unfamiliar environment of the courtroom, was corroborated by the testimony of Sarah Elizabeth Shuh, M.D., a licensed medical doctor, board certified in pediatrics. App. 31A. Moreover, inconsistency, incompleteness and recantations in child sexual abuse cases not uncommon. See, *Myatt v Hannigan*, 910 F.2d 680, 685, n.2 (10th Cir. 1990).

Dr. Shuh's examination of both girls on January 15, 1993 yielded abnormal physical findings. App. 32A; 34A-36A. During her vaginal examination of Savannah Herring, Dr. Shuh observed a "small notch representing an old scar in the interior portion of the hymen; a small scar external and posterior to the vaginal opening". App. 36A; 35A. During the rectal exam, Savannah indicated to Dr. Shuh she had "been hurt there before." App. 35A. Dr. Shuh noted a small triangular tag scar more external to the anal opening adjacent to a paler scar which extended into the anal canal which indicated trauma. *Id.* Dr. Shuh opined that: the hymenal scar was consistent with penetration of the hymenal opening into the vaginal canal; the scar "external to the vaginal opening but in the genitalia is compatible with an injury to the superficial tissues which could have been caused by sexual abuse"; and the scar in the anal canal was also compatible with penetration. Dr. Shuh testified on cross-examination that it was not "plausible" that Savannah's rectal scarring could be caused by the administering of Fleet enemas to relieve constipation, as the Respondents attempted to claim. App. 39A. Dr. Shuh also testified that urinary tract infections "could not explain the hymenal scar." App. 39A-40A.

Dr. Shuh's examination of Teresa revealed a small

posterior lateral scar in the anal canal which was "consistent with sexual abuse," corroborating both Teresa's testimony that her father had placed a finger in her "hiney," and her statement made to Dr. Shuh of object penetration. App. 36A-37A. Dr. Shuh also testified that many forms of sexual abuse leave no physical findings such as fondling, oral sex, vaginal finger penetration, and rectal penetration with the use of lubricants. App. 37A-38A.

I. REPLY TO IN FORMA PAUPERIS MOTION

Annexed to their brief in opposition to the Petitioner's Petition for writ of certiorari, the Respondents have filed a motion to proceed *in forma pauperis*. Notably, the Respondents have included in their Appendix a recent affidavit and complaint which indicates that the children's mother inexplicably left the family home and moved out of state to North Carolina. See, Resp. App. pp. 9 and 5. The Affidavit, dated June 10, 1997 and signed by a case worker for the DSS, and Complaint, dated July 29, 1997, further indicate that the children now reside only with their father, who was initially alleged by the DSS to be the primary accused perpetrator of physical and sexual abuse. See, Pet. App. pp. 20A, 21A and 10A. The Respondent father, apparently the children's primary caretaker at the present time, represented to the DSS in June of this year that he is now working outside the home as an electrician.

The Respondents' motion for leave to proceed *in forma pauperis* is unsupported by notarized affidavits or unsworn declarations made under penalties of perjury and as required by Supreme Court Rule 39.1. Rule 39.1, when read with F.R.A.P. form 4, requires the Respondents to set forth by affidavit or by declaration under penalties of perjury the required employment and asset information contained in F.R.A.P. Form 4. Respondents' counsel was neither appointed under the Criminal Justice Act, nor under a federal statute, which would relieve the Respondents of supplying an affidavit or declaration.

The Petitioner is mindful of this Court's holdings in *Lassiter v Dept. of Social Services*, 452 U.S. 18 (1981) and *MLB v SLJ*, 519 U.S. (1996), both of which were termination of parental rights cases. This Court held in *Lassiter*, that under the

circumstances of that case, the Eldridge factors were satisfied, overcoming the presumption against the right to appointed counsel. In *Lassiter*, due process required the appointment of counsel in a termination of parental rights case. Significantly, the DSS in this case did not seek the drastic relief of termination of parental rights as in *Lassiter*; rather the DSS complaint sought only protective custody of the children. After a statutory mandated merits hearing, the family court could have continued temporary protective custody - with or without visitation privileges - or ordered counseling for the parents, or ordered reunification with counseling and/or continued monitoring of the family home. Pet. App. 9A-12A.

The Petitioner has a strong interest in the accuracy of any decision concerning the interests of children and shares an interest in the accuracy of any decision possibly infringing parental interests, when those interest coincide. In addition, the Petitioner shares an interest in the informality of procedures before this Court should the Respondents motion to proceed *in forma pauperis* be granted. It is respectfully requested, however, that the Court direct both Respondents to file either notarized affidavits or unsworn declarations in compliance with Rule 39.1 so the Court may properly evaluate the Respondents' claim of indigency.

II. A RIGHT TO APPELLATE REVIEW ON THE TRIAL RECORD WAS DENIED THE CHILDREN

The Respondents claim that the petition "brushes past the next step in the procedural history of the case" (Resp. brief p.1), meaning the South Carolina Court of Appeals. The Respondents further claim that "only by pretending that review by the South Carolina Court of Appeals never occurred can Petitioner advance her first argument" (Resp. brief p.11). Both contentions are without merit. On the contrary, the petition describes the proceedings before the Court of Appeals at length. See Pet. for Cert. pp. 9-11. Moreover, the Respondents second claim is a nonsequitur. The Petitioner's constitutional claims raised in her first argument, i.e., that the due process and equal protection clauses of the 14th Amendment prohibit appellate courts from remanding protective custody cases on the basis of staleness, could not conceivably have been reviewed by the South Carolina Court of Appeals. It was the

South Carolina Supreme Court which, after granting certiorari, after briefing, and after entertaining oral argument, dismissed the Petitioner's appeal with an opinion. In accordance with South Carolina Appellate Court Rule 226(b), the only two applicable considerations governing certorari review are "where substantial constitutional issues are directly involved" and "where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court". The South Carolina Supreme Court concluded a constitutional issue or federal question was before it. The dismissal was due to the court's presumed "staleness" of the record. The federal constitutional issue raised in the petition concerning the South Carolina Supreme Court's dismissal was not before the Court of Appeals. The Respondents' claims that "full appellate review was not evaded in this matter" and "that Petitioner failed to get a second bite at the appellate apple is of no constitutional moment" (Resp. brief p. 12) are simply incorrect. There has been no appellate review of the South Carolina Supreme Court's order of dismissal for staleness.

In relying upon the discretionary review afforded by writs of certiorari before the South Carolina appellate courts (Resp. Brief p. 12), the Respondents overlook the significance of a key procedural step in the proceedings below. The South Carolina Supreme Court did grant certiorari, invoking its jurisdiction to undertake appellate review. See, Pet. App. p. 1A. While it is true that a state is not required by the Federal Constitution to provide appellate review, a state which does grant appellate review must do so in a manner which does not infringe upon constitutional rights. *M.L.B. v S.L.J.*, 519 U.S. (1996)(slip op., at 6). A state which does grant appellate review, as did the South Carolina Supreme Court, must entertain review in a manner consistent with the Due Process and Equal Protection clauses and protect persons from invidious discrimination. *Griffin v Illinois*, 351 U.S. 12, 18 (1956). Once certiorari was granted by the South Carolina Supreme Court, the children were entitled to full and meaningful appellate review of the record then before the court - not an order of dismissal for staleness. This court granted certiorari review following a dismissal in *Stantosky v Kramer*, 455 U.S. 745 (1982).

The Respondents are incorrect in their claim that the

"petition, at bottom, is really an attack on the factual findings of the family court" (Resp. brief p. 13)[2]. On the contrary, the South Carolina Supreme Court dismissed the Petitioner's appeal on the basis of "staleness", not on the grounds that the allegations of trial error were insufficient. Factual findings and evidence are recited in the petition only in so far as they relate to the federal constitutional issues raised in part II of the Petition concerning the judicial bias claim. Certiorari should be granted by this court to decide whether the South Carolina Supreme Court's order of dismissal due to the staleness of the record is constitutional infirm. See, Pet. App. 1-3A.

III. THE ISSUE OF JUDICIAL BIAS WARRANTS REVIEW BY THIS COURT

The issue of judicial bias first became apparent only after Family Court Judge Bonnoitt rendered his decision. It was too late in the proceedings to request recusal. The Petitioner properly raised the judicial bias issue in the South Carolina Court of Appeal, and at her earliest opportunity.

The Respondents confuse issues of competency with the role of the family court judge in being an impartial arbiter in weighing the evidence and reviewing the sufficiency of the evidence. Resp. Brief pp. 16-17. The competency of the children and admissibility of hearsay statements are not in issue. The Respondents fail to address the obvious bias apparent from prejudicial statements made by the family court judge such as "[t]his court must be cognizant of the inherent unreliability of evidence presented of children this age...". Pet. App. 22A. So

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[2] The Respondents dwell on trial testimony offered by character witnesses from their church.(Resp. brief p.7). Pedophiles come from all walks of life and are men and women of every social class, occupation and religion. The recent case of former Catholic priest James Porter is a prime example of an upstanding member of the community - a Catholic priest - sexually abusing children in secrecy. Porter abused over 68 children in a 34 year span. Bowman & Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy,* 109 Harvard Law Review 549, 610 (1996); 68 Temple L. Rev. 249, 251, n.17 (1995).

broadly worded, this statement discredits even the most solid physical evidence of sexual abuse, such as a semen sample with a positive DNA match with the perpetrator. The remark categorically discredits all evidence presented of children this age, regardless of the quality. The family court judge attempted to conceal his bias by changing the prejudicial remark on reconsideration from the "evidence presented of children of this age" to "memory evidence presented by children". App. 26A. Nowhere do the defendants address in their brief the deep-seated favoritism and antagonism evidenced by these biased remarks.

In addition, the Respondents, without a direct quote, distort the nature of the most egregious remark made by the family court. The prejudicial remark was: "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry". App. 28A. The remark was directed at a generalized "child sexual abuse industry", comprised of child advocates, not the illegal commercial enterprise which sexually exploits children. The Respondents distort the record by improperly projecting the court's generalized prejudicial remark concerning the "child sexual abuse industry" onto the Petitioner in stating "the remark at the end of the order on reconsideration regarding the objectivity of Petitioner, her counsel, and her witnesses is not extra-judicial, but derived from the family court's observations of these people in the courtroom in this case". Resp. brief p. 19. The Respondents' diversionary tactic is unvieled when their brief is read together with the precise words of the family court judge. In actuality, the remark made by the court, on its face, derives from extrajudicial opinions formed by the judge about a fictitious "child sexual abuse industry" existing outside the case and is far more antagonistic than the Respondents' brief would suggest. Indeed the remark falls into the category of the deep-seated bias and antagonism contemplated by this Court in *Liteky v United States*, 510 U.S. 540, 555 (1994). The statement is not wholly unlike the example given in in *Liteky* from *Berger v United States* that German-American "hearts are reeking with disloyalty". *Id.*

The Petitioners concerns regarding the extrajudicial impact of fringe advocacy groups on uninformed family court judges, as described at page 25 of her petition, are not unfounded. A very

recent decision of the United States District Court for the District of Maryland in *Pamela Freyd, et al vs Charles Whitfield*, Civil no. L-96-627, summarizes the intensive media campaign engaged in by one such organization. The False Memory Syndrome Foundation ("FMSF") has been known to broadcast its propaganda widely through its spokespersons in national newspapers and magazines, the Internet, and well-known television and radio news programs. *Id.* Over 247 articles about the FMSF and its founders have been published in national newspapers and magazines such as USA Today, The Washington Post, The Baltimore Sun, The Chicago Tribune, The Los Angeles Times, The Dallas Morning News, Newsweek, Time Magazine, and Psychology Today. The founders of the FMSF have appeared on Frontline, Good Morning America, and National Public Radio. *Id.* Given the very vocal efforts of an organization which advocates the interests of those accused of child sexual abuse and incest, it is probably no coincidence that the Family Court judge adopted the FMSF rhetoric in its opinion by using demeaning catch phrases such as "child sexual abuse industry".

CONCLUSION

The petition for writ of certiorari should be granted.

THE PETITIONER,

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